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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 514

W. E. GAMBLE, ADMINISTRATOR DE BONIS NON OF THE ESTATE OF W. J. GAMBLE, DECEASED,

Petitioner,

vs.

R. J. GAMBLE AND ANNA DORA GAMBLE

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

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INDEX

	Page
Petition for Certiorari	1
Opinion Below	2
Jurisdiction	2
Federal Questions Raised	2
Summary Statement of Matter Involved	3
Reasons for Granting the Writ	7
Supporting Brief	7
Due Process of Law	13
Prayer for the Writ	15

Cases Cited

Sternbridge v. *Stevens*, 104 Georgia 622	10
State of Missouri, ex rel. Gaines v. *Canada et al.*, 305 U. S. 357 (7)	11
Hill v. *State of Texas*, U. S. 316, Page 400	12
Battle v. *Royster Guanna Co.*, 155 Ga. 322	12
Tedder v. *Stiles*, 16th Ga. 1, 2 (6)	12
Louisville Gas Co. v. *Cameron*, 207 U. S., Page 321	15

Statutes Cited

Article 14 of Federal Constitution as Incorporated in Georgia Code 1933, Section 1-815	3
Code 1933, Code of Georgia, Section 81-404	5
Code 1933, Section 110-502	8
And	
Code Section 110-504	8

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Respondents

PETITION OF WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

MAY IT PLEASE THE COURT:

W. E. Gamble as Administrator De Bonis Non of the Estate of W. J. Gamble, named as original plaintiff in the stated case, files this his petition for writ of certiorari to issue to the Supreme Court of Georgia, for the purpose of having reviewed, corrected and reversed, a judgment of the Supreme Court of Georgia entered upon November 15th, 1950, denying a motion for rehearing and re-affirming

its judgment as entered on October 9th, 1950, affirming the judgment of the Superior Court of Fulton County, Georgia, Atlanta Circuit, as entered in the original case on the 29th day of June, 1950, overruling the motion for new trial of plaintiff in the original case and re-affirming the original judgment as entered in said cause.

The Supreme Court of Georgia is therefore the highest Court of Georgia in which a decision in this case could be had.

Opinion Below

The opinion of the Supreme Court of Georgia denying plaintiff's motion for rehearing and adhering to its decision as originally entered, was entered on November 15th, 1950 and has not been published, but the opinion is fully set out in the record (R. 18).

Jurisdiction

The jurisdiction of the Court is invoked under Section 1257 (3) of Title (28 U. S. C. A.), the highest Court of the State of Georgia having denied to petitioner a title right, privilege and immunity especially set up and claimed by him under the Constitution of the United States.

Federal Questions Raised

The Federal issues were raised for the first time in the pending case in the motion of petitioner for a rehearing of the case in the Supreme Court of Georgia upon the affirmance of the judgment of the lower court, (R. 19) in which motion for rehearing the judgment of the Supreme Court of Georgia as entered in said case, was directly attacked upon the ground that the judgment of the Supreme Court of Georgia in and for itself was a denial to petitioner of

due process of law and was a denial to petitioner of the equal protection of the law (R. 19) in contravention of:

ARTICLE 14

of the Constitution of the United States as incorporated in Georgia Code 1933, Section 1-815, which provides:

"That all persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside. No State shall make or enforce any law which abridges the privileges or immunities of the citizens of the United States, nor shall any State deprive any persons of Life, Liberty or Property without due process of law, nor deny to any persons within its jurisdiction, the equal protection of the law." (R. 28).

In that, the judgment of the Supreme Court of Georgia in affirming the judgment of the lower court in the stated case, while admitting that the lower court erred in not sustaining plaintiff's demurrer to the defendants' plea of res adjudicata, arbitrarily refused plaintiff a new trial, thus arbitrarily denied plaintiff the right to try his case involving his property rights in harmony with fixed rules of law, equity and procedure, and denied the plaintiff the right to try the issues as related to forgery of the deeds affecting the title to the property belonging to the estate of W. J. Gamble, for which estate, petitioner was administrator de bonis non (R. 1 to 7 inclusive).

Summary Statement of the Matter Involved

W. E. Gamble filed his equitable petition returnable to the Superior Court of Fulton County, Georgia (Atlanta Circuit) against R. J. Gamble and Anna Dora Gamble in

which it was alleged that W. J. Gamble died intestate on January 4, 1926, seized and possessed of the properties described in the petition.

It was also alleged that Mattie E. Gamble, widow of the deceased and two sons of the deceased, R. J. Gamble and petitioner, W. E. Gamble, together with the children of a deceased daughter, were the heirs at law of the deceased.

It was alleged that Mattie E. Gamble qualified as Administratrix of the deceased, W. J. Gamble, and went into the actual possession of the properties of the deceased, including the properties described in the petition.

It was alleged that Mattie E. Gamble died while in possession of the properties of the deceased as Administratrix without having administered upon the properties of the deceased as described in the petition.

It was also alleged that R. J. Gamble and Anna Dora Gamble were in possession of the properties subsequent to the death of Mattie E. Gamble.

It was alleged that neither R. J. Gamble nor his wife, Anna Dora Gamble had any valid deeds to the properties of the deceased as described in said petition.

It was also alleged that an instrument purporting to be a deed of conveyance from Mattie E. Gamble as Administratrix of the estate of W. J. Gamble to R. J. Gamble, was a forgery and that no title to the properties of the deceased passed into the defendants.

It was also alleged that petitioner had filed in the office of the Court of Ordinary of Fulton County, Georgia, an application to be appointed Administrator De Bonis Non of the estate of W. J. Gamble, and that so soon as he was appointed as such administrator, it was his intention to institute suits at law or in equity, for the purpose of setting aside the conveyance referred to and to recover the possession of the properties described for the purpose of administration.

It was also alleged that in order to protect the estate of W. J. Gamble from loss, the office of a Court of Equity was invoked to preserve the status until such time as an administrator de bonis non could be appointed. (See R. 1 to 7.)

Subsequently the petition of W. E. Gamble was amended and it was made to appear that W. E. Gamble had been appointed Administrator De Bonis Non of the estate of W. J. Gamble and the stated case was directed to proceed in the name of W. E. Gamble as Administrator De Bonis Non of W. J. Gamble (R. 7).

To the petition as amended, the defendants filed a plea of res adjudicata, contending that the issues and parties in a designated case and the issues in the pending case were the same, and prayed judgment of the Court to sustain the plea.

This plea was not sworn to as required by Georgia Code of 1933, Section 81-401, which provides as follows:

"In all cases where the plaintiff shall file a petition with an affidavit attached that the facts stated in the petition are true to the best of his knowledge and belief, the defendants shall in like manner verify any plea or answer." (See R. 8 to 10.)

To the plea of res adjudicata, the plaintiff in the original case, the now petitioner, filed a general demurrer, contending, among other objections, that the defendants' plea was not sworn to (R. 11), therefore, fatally defective and amounting to no valid defense.

The demurrer of plaintiff was by the Trial Judge, overruled (R. 12).

To the judgment of the lower court in overruling the demurrers of plaintiff, the plaintiff excepted pendente lite and the same was certified to and became a part of the record (R. 12).

The case proceeded to trial upon the sole issue as raised by the plea of res adjudicata.

The lower court directed a verdict to be returned in favor of the plea and judgment was entered to sustain the plea and plaintiff's case was dismissed (R. 15).

Plaintiff filed his motion for new trial and prayed that a new trial be granted (R. 16).

The motion for new trial was denied (R. 17).

Plaintiff carried the case to the Supreme Court of Georgia by a direct Bill of Exceptions, assigning error upon the rulings of the Court overruling the demurrer of plaintiff to the defendants' plea of res adjudicata.

The Supreme Court of Georgia in its decision, held that the demurrer of plaintiff to the defendants' plea of res adjudicata should have been sustained by the lower court. The court then refused to grant plaintiff a new trial, arbitrarily saying in its opinion that "Since upon reversal an amendment to meet the demurrer would be allowable and a case thus made would demand a judgment sustaining the plea and since this litigation has been pending since 1941, although it should have terminated with the first judgment, we will not order a new trial on account of the defect in the plea (R. 18-19)."

Upon the judgment of the Supreme Court of Georgia being entered, W. E. Gamble as Administrator De Bonis Non of the estate of W. J. Gamble filed his motion for a rehearing of the stated case, and for the first time raised the Federal questions and contended in said motion for a rehearing, that the judgment of the Supreme Court of Georgia if adhered to, would be a denial to plaintiff of due process of law and equal protection of law in violation of:

Article 14 of the Constitution of the United States (R. 19).

The motion for rehearing was denied on November 15, 1950 (R. 31).

Reasons for Granting the Writ

The decision of the Supreme Court of Georgia disposing of the Federal questions raised by Petitioner in his motion for rehearing in and of itself deprives petitioner of his right to the Courts of the Realm for protection to property and denies petitioner the equal protection of law as related to established rules of law and procedure in violation of the Fourteenth Amendment of the Federal Constitution.

Supporting Brief

1

The Supreme Court of Georgia is without jurisdiction wherein it renders a judgment in which it decides a question of law contrary to prevailing decision of the Supreme Court of Georgia and contrary to the express statutes of Georgia or contrary to or in conflict with the Constitution of the State of Georgia or the Constitution of the United States.

The judgment of the Supreme Court of Georgia is a headnote decision and Chief Justice Duckworth says in number two of said opinion:

"But error is assigned on the judgment overruling the demurrer to the plea upon the ground that it was not verified.

"The petition was verified and this would require a verification of the plea."

Citing Code of Georgia—81-404

Therefore, the Supreme Court of Georgia in its decision, admits that the plea was fatally defective, and we contend that the Supreme Court of Georgia was bound by this expressed statutory provision and the judgment of the lower

court should have been reversed: But the Supreme Court of Georgia says, "this defect is amendable." While this might have been true if the plea was sought to be amended in the court below, it was not sought to be amended in the court below, and petitioner contends that it could not have been amended in the Supreme Court of Georgia.

The Supreme Court further says in its opinion:

"Since we take cognizance of our decision and thereby know that the former adjudications preclude the plaintiff in error, citing Code Sections—Code of Georgia 1933, Sections 110-502 and Code Sections 110-504."

Code Section 110-502, provides:

"A judgment in rem is conclusive upon everyone."

Code Section 110-504, provides:

"If upon demurrer, the Court shall decide upon the merits of the case, the judgment may be pleaded if upon demurrer the Court shall decide upon the merits of the cause, the judgment may be pleaded in bar of another suit for the same cause."

These Code Sections do not relate to any former adjudications from which the Supreme Court of Georgia could know that plaintiff could be precluded.

The Supreme Court of Georgia in its decision, refers to the two cases of:

1. The case of W. E. Gamble suing individually and for the benefit of the heirs of a sister of the deceased, W. J. Gamble.

This case is reported in 193 Georgia, Page 591, and is a suit against R. J. Gamble (a son of the deceased, W. J. Gamble) and Mattie E. Gamble, individually, and Mattie E. Gamble as Administratrix of the estate of W. J. Gamble.

This case was for an accounting.

This case went to the Supreme Court of Georgia assigning error upon the judgment of the lower court overruling the demurrer of defendant, R. J. Gamble. The other defendants did not join in the appeal.

The only question before the Supreme Court of Georgia in that case, was limited to the sole question on demurrer as related to the statute of limitations, and the only question decided, was predicated upon the statue of limitations.

The judgment in that case was in favor of the estate of W. J. Gamble.

None of the issues in the pending case were attempted to be passed upon.

The question of forgery was not passed upon.

There was no final judgment in the Supreme Court of Georgia, relating to the merits of the cause—there was no judgment in rem. That case merely held that the plaintiff could not sue the administrator for an accounting, because of an elapse of time.

The existence or non-existence of the statute of limitations is not raised in the pending case.

The representative of the estate of W. J. Gamble, was not, in that case—precluded from proceeding in any subsequent case, for the recovery of property belonging to the estate of W. J. Gamble.

The merits involved in the Gamble case reported in 193 Georgia, were not passed upon.

The parties in the Gamble case referred to, were not the same.

The cause of action was not the same as those in the pending case.

The two actions were not in the same right.

Petitioner contends that the judgment as rendered, in the Gamble case reported in 193 Georgia, could not by the wildest stretch of judicial imagination be invoked to sup-

port a plea of res adjudicata as insisted upon in the pending case.

In this connection we cite the case of *Sternbridge* v. *Stevens,* 104 Georgia 622, in which case it is held; by a full bench, that in order to support a plea of res adjudicata there must be a conjunction of:

"1. Identity of subject matter.
2. Identity of causes in action.
3. Identity of persons and parties.
4. Identity of: in the quality of the person against whom the suit is brought."

The other case, referred to by the Supreme Court of Georgia, is the case of *Gamble* v. *Gamble* reported in 204th Georgia, page 82: In this case the decision was predicated upon the ruling in 193 Georgia, and therefore, it follows, if the decision in the 193 Georgia could not amount to a plea of res adjudicata as against the right of the estate to sue for the recovery of property belonging to the estate, then it must follow for the same reason, that the decision in the 204th Georgia could not be held applicable to the contention as made by the Supreme Court of Georgia in the pending case, holding that either of the reported cases, precludes the plaintiff—petitioner, from proceeding against the defendant for the recovery of the property belonging to the estate of W. J. Gamble, and petitioner contends that the Supreme Court of Georgia in so holding —arbitrarily denied petitioner from being permitted to try the issues of forgery and other issues as made by petitioner in the lower court, and also denied petitioner the right to proceed in the court below with his lawful and equitable rights for the purpose of protecting the Constitutional right, incident to the enjoyment of property.

The only issues that the Supreme Court of Georgia undertook to pass upon in the case now sought to be reviewed,

and in fact, the only issues that could legally bee decided, was whether the demurrer in the court below wass good or bad, and petitioner contends that the Supreme Court of Georgia having admitted that the plea of res adjudicata as filed by the defendants was fatally defective, that petitioner was entitled to a reversal of the judgment in the court below and a new trial should have been awarded to petitioner as a Constitutional right.

The Supreme Court of Georgia in concluding its opinion, says: "Since upon reversal, an amendment to reach the demurrer would be allowable and a case thus made would demand a judgment sustaining the plea, and since the litigation has been pending since 1941, although it should have been terminated with the first judgment, we will mot enter a new trial on account of the defect in the plea."

This is to us a most unusual conjecture, and ome which we believe cannot be supported by any substantiall authority. The language of the court is prophetic im nature without any substantial base to support the prophecy.

Petitioner contends that the Court having admitted that the General Demurrer of petitioner to the defendamts' plea of res adjudicata, should have been sustained, and the judgment of the lower court should have been reversed and the case should have been remanded to the lower court for a final judgment to be entered, dismissing defendamts' plea of res adjudicata, and that the Supreme Court in denying petitioner the Constitutional right, was a denial to petitioner of due process of law and a confiscation of a property right to which petitioner under the organic law was entitled.

The equal protection of laws is a pledge of the protection of equal laws.

State of Missouri, Ex Rel. Gaines v. *Canada, et al.*, 305 U. S. 357 (7).

"Equal protection of the law is something more than an abstract right. It is a command which the State must respect—the benefit of which every person may demand."

Hill v. *State of Texas,* U. S. 316, Page 400.

The Supreme Court of Georgia in its decision, seems to predicate its opinion upon the conclusion:

"That no injury was suffered by the plaintiff in the overruling of plaintiff's demurrer to defendants' plea of res adjudicata." (See R. 18.)

This conclusion is to us beyond mental conception. The Court admits that the demurrer should have been sustained, but it says that it would deny plaintiff a new trial.

In refusing to grant plaintiff a new trial, the judgment in the court below was affirmed and Plaintiff's original case would stand dismissed, and petitioner was denied the Constitutional right to try the issues involved in the main case and petitioner was deprived of a property right without due process of law.

It is the law of Georgia—that—"Errors are presumed to be harmful to the losing party unless the contrary plainly appears."

The foregoing statement was made by the Supreme Court of Georgia in a decision by a full bench in the case of:

Battle v. *Royster Guanna Co.,* 155 Ga. 322.

The principle there followed, was laid down in different angles by the same Court in the early case of:

Tedder v. *Stiles,* 16th Ga. 1, 2: (6) which holds:

"Whenever the rights of a party are withheld or violated, the presumption of law is that he has been harmed.

Clearly in view of the language embodied in the decision of the Supreme Court of Georgia, the Supreme Court by its

own decision held that the demurrer of W. E. Gamble, Administrator De Bonis Non of the estate of W. J. Gamble, to defendants' plea of res adjudicata—was fatally defective and this being true the reasons set forth by the Supreme Court of Georgia, in Support of its conclusions to deny a new trial, were not of any Constitutional force, and the arbitrary ruling of the Court in refusing to grant petitioner a new trial, amounted to the denial to petitioner of due process of law and the equal protection of law, in that, petitioner was by the arbitrary refusal to grant him a new trial (under the circumstances as set forth and for the reasons given) denied the right to proceed in the Court below with his lawful and equitable rights for the purpose of protecting the Constitutional right incident to the enjoyment of property.

The reasons specified by the Supreme Court of Georgia in its decision (R. 18—Section 2 of the opinion) had the effect of breathing into the defendants' plea of res adjudicata a life giving substance, that was in collision with expressed statutory provisions of the law of Georgia and was in contravention with judicial authority.

Due Process of Law is:

A motion—proceeding under definite requirements to command what is right and prohibit what is wrong.

The petition of petitioner, in the lower court was required to be sworn to and was sworn to (R. 1 to 7 inclusive).

The defendants' plea of res adjudicata was likewise required to be sworn to and was not sworn to (R. 8 to 10 inclusive).

These facts were admitted to be true by the decision of the Supreme Court of Georgia. (See R. 18—No. 2 of the decision of the Supreme Court of Georgia.)

Therefore, it follows that the plea of res adjudicata did not meet the requirements as related to due process of law.

In fact and in law, defendants' plea of res adjudicata amounted in law to no process and petitioner contends that the Supreme Court of Georgia in denying petitioner a new trial arbitrarily prevented petitioner the right to enjoy equal protection of the law.

In other words, petitioner was, by the arbitrary rulings of the Supreme Court of Georgia, placed in position similar to:

Where a person was indicted for murder and a demurrer was filed to the indictment and the demurrer was overruled and the Appellate Court upon review of the error assigned said—

"That the lower court erred in overruling the demurrer: Yet, the Appellate Court takes cognizance of its decisions and thereby knows from former adjudications that the defendant is guilty, since no injury was suffered by this error, since upon reversal an amendment would be allowable and a case thus made would demand a judgment against defendant, we will therefore, not order a new trial on account of the defect in the indictment."

(We think the simile germane.)

In such a conclusion, what would become of the doomed man?

In the instant case, the Supreme Court of Georgia in No. 2 of its opinion—Record 18 says:

"But error is assigned on the judgment of the lower court overruling the demurrer of petitioner to the defendants' plea upon the ground that it was not verified.

"The petition was verified and this would require a verification of the plea.

"This defect is amenable—therefore, we take judicial cognizance of our decisions and therefore know that the

former decisions preclude the plaintiff in error and since no injury was suffered, we will not order a new trial."

By the failure of the Supreme Court of Georgia to grant petitioner a new trial, he was necessarily placed in the same position of the doomed man referred to in the illustration as herein set forth.

Petitioner has sought to have the courts of Georgia rectify the gross injustice done to him, but without success. We now ask this Court to invoke its advisory powers to reverse the decision of the Supreme Court of Georgia wherein it needed petitioner's claims to due process of law, and the equal protection of law as herein and heretofore set forth as was said, in the case of *Louisville Gas Co.* v. *Cameron,* 207 U. S. Page 321:

"The equal protection clause means that the rights of all persons must rest upon the same rules under similar circumstances. It applies to the exercise of all powers of the State, which can affect the individual or his property."

Petitioner contends that he was denied the privileges and immunities as specifically prescribed in this most applicable case.

WHEREFORE, it is most respectfully submitted that this petition for a Writ of Certiorari to review the judgment of the Supreme Court of Georgia should be granted.

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BRIEF

For Respondents Opposing Petition for Certiorari.

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W. E. GAMBLE, Administrator De Bonis Non of the Estate of W. J. Gamble, Deceased, Petitioner,

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BRIEF

For Respondents Opposing Petition for Certiorari.

This case represents the third appearance of this litigation before the Supreme Court of Georgia, each decision there being adverse to petitioner. In all three appearances the parties were the same, the causes of action were the same, and the same property was involved. See opinion of the Supreme Court of Georgia (R. 18).

The only pretense that this case involves a federal question grows out of a contention by petitioner that since the respondents' plea of res adjudicata was not verified, a

judgment based thereon deprived petitioner of his Constitutional rights. The Supreme Court of Georgia found, however, that this was harmless error, and in fact took judicial notice that petitioner could not recover in any event. It is this finding of which petitioner complains which, in effect, amounts to no more than a contention that the doctrine of "harmless error" is itself unconstitutional. This, it is said, presents a federal question.

So far as we know, the rule of "harmless error" has been uniformly recognized and applied by all reviewing courts, both Federal and State, since the foundation of our government.

Pugh v. McCormick, 81 S. Ct. 361, 14 Wall. 361, 20 L. Ed. 789;
Carlisle Packing Co. v. Sandanger, 42 S. Ct. 475, 259 U. S. 225, 66 L. Ed. 927;
West v. Camden, 135 U. S. 507, 521, 34 L. Ed. 254, 258, 10 S. Ct. 838.

Certainly it has been applied many times by the Supreme Court of Georgia, and there is nothing unconstitutional, or even new or unusual in its application to the facts of the present case. See the following Georgia cases in which the doctrine has been applied:

Southern Cotton Oil Co. v. Thomas, 155 Ga. 99 (117 S. E. 456);
Smith v. McWhorter, 173 Ga. 255 (160 S. E. 250).

Moreover, after proof of a plea before the jury, the question of its preliminary verification has become moot; especially where it can be judicially noted that petitioner already knew both of the existence and truth of its contents and that the same judgment must follow in any event. A reference to the record will show that the unverified plea of res adjudicata of which petitioner complains

consisted entirely of a transcript of the record in a previous suit between the same parties and upon the same subject matter and action, all of such contents being matters of public record to which a verification could not possibly add additional dignity. The record will also show that the petitioner himself must have had actual knowledge both of the existence and truth of these records, since he had been a party to the case in which they were made, a great many of the pleaded exhibits consisting of his own sworn pleadings in the former case. It further appears that on the trial of the plea the original copies of all these former pleadings were introduced in evidence. Thus it conclusively appears that petitioner could not possibly have been harmed by a failure to verify, since the truth of the allegations must of necessity have been well known to him. The Supreme Court of Georgia also took judicial notice of the fact that the suit was barred and that petitioner could not recover in any event.

We recognize, of course, that all of these questions were matters for the determination of the state court and go to the merits of the case rather than the granting of certiorari. We cite them, however, merely to show that unless this Court should determine that the doctrine of "harmless error" is inherently unconstitutional, no federal question could conceivably be involved. Accordingly, we submit that the petition for certiorari here contains no matters of such special importance or of any federal question of substance not heretofore dealt with by this Court, or other reasons, as would warrant this Court in its sound judicial discretion to entertain this writ.

Since it appears that this is the third appearance of this case in the Supreme Court of Georgia, and since, as that Court has said, "this litigation has been pending since 1941, although it should have terminated with the first judgment," respondents respectfully request that this

Court award damages for delay as authorized by Section 2103 of the Judicial Code (28 U. S. C. A., 2103). See **Wagner Elec. Mfg. Co. v. Lyndon, 262 U. S. 226, 43 S. Ct. 589, 67 L. Ed. 961.**

Respectfully submitted,

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